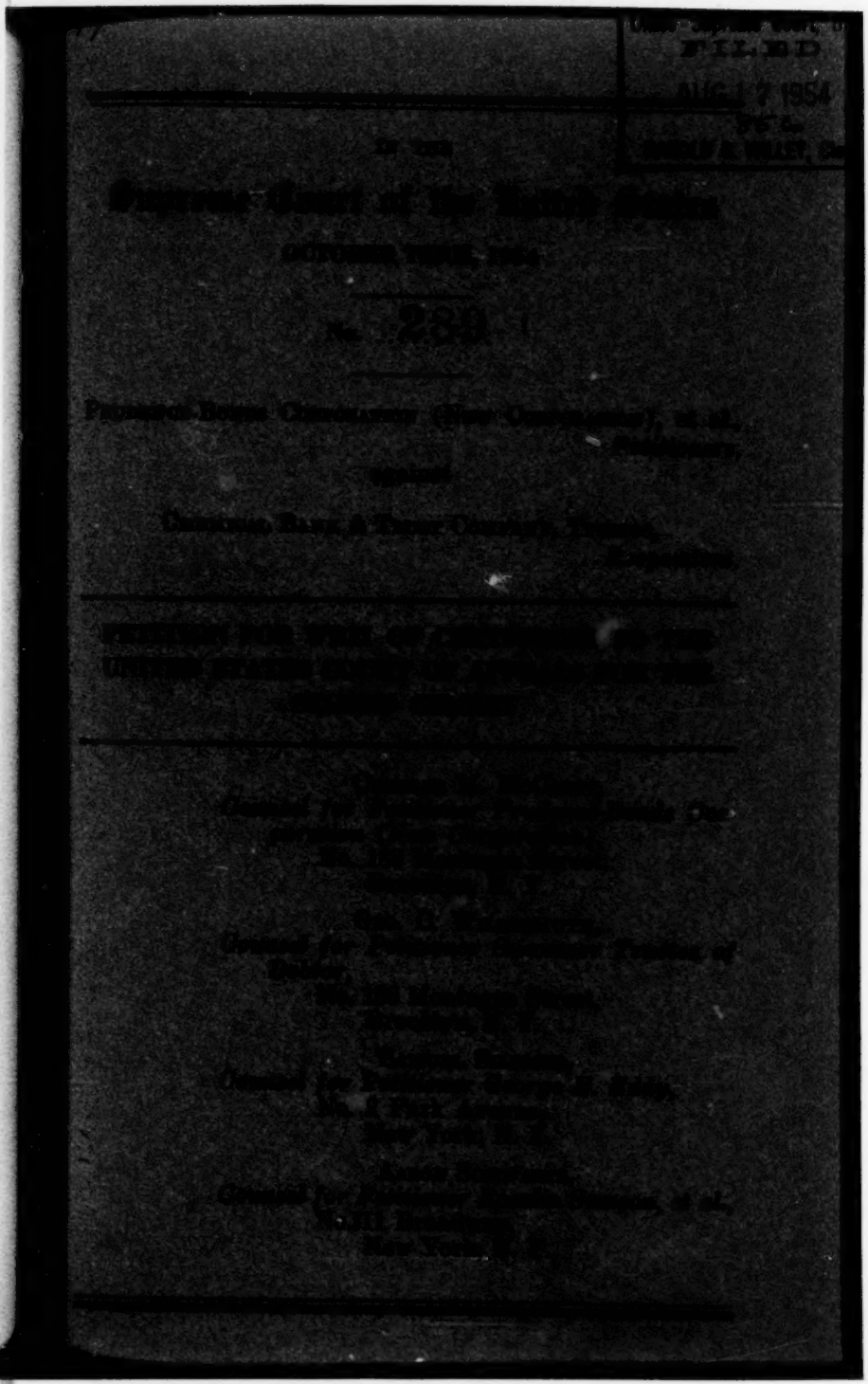


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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. .....

PRUDENCE-BONDS CORPORATION (NEW CORPORATION), et al.,
Petitioners,

against

CHEMICAL BANK & TRUST COMPANY, Trustee,
Respondent.

PETITION

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, Prudence-Bonds Corporation (New Corporation), Louis J. Castellano, Jr., Successor Trustee of Prudence-Bonds Corporation, Debtor, George E. Eddy, Rosalie Samson, Gottlieb Trading Company, Transient Trading Company, Keystone Investing Company, Mardel Company, Rego Trading Company and Estate of Herman Gottlieb, respectfully pray that a writ of certiorari issue to review the judgment or decree of the United States Court of Appeals for the Second Circuit, entered June 3, 1954, modifying a decree of the United States District Court for the Eastern District of New York entered October 23, 1953, on the mandate of the Court of Appeals on a prior appeal reported as *Chemical Bank & Trust Company, Trustee* v. *Prudence-Bonds Corporation (New Corporation), et al.*, 207 F. 2d 67, cert. den., 347 U. S. 904 (R. 44a).*

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* The letter "R" refers to pages of the certified transcript of record; the letters "AA" to pages of Appendix to Appellant's brief in Court below; the letter "A" to pages of Appendix to Appellees' brief in Court below.

Opinions Below

The majority and dissenting opinions of the Court of Appeals for the Second Circuit (R. 37a-43a) are not yet reported, but are printed in the Appendix hereto, *infra*, pp. 13-19.

No opinion was rendered by the District Court.

Jurisdiction

The judgment or decree of the United States Court of Appeals for the Second Circuit was entered on June 3, 1954 (R. 44a) and is printed in the Appendix hereto, *infra*, pp. 19-20.

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1) and Sec. 24(c) of the Bankruptcy Act, 11 U. S. C. Sec. 47(c).

Question Presented

Where a money judgment is increased by a United States Court of Appeals and the mandate is silent on the subject of interest on the amount of the increase pending appeal;

Is the successful appellant entitled to interest on the amount of the increase from the date of the district court's original judgment at the rate allowed by State law on money judgments, or should the Court of Appeals, to achieve justice, amend its mandate to award such interest?

Statutes

The pertinent provisions of statutes involved are set forth in the Appendix hereto, *infra*, pp. 20-21.

Statement

This case involves the reorganization of Prudence-Bonds Corporation, Debtor, under the Bankruptcy Act, and, more particularly, a proceeding had in the reorganization court, Eastern District of New York, for the judicial settlement of the account of Chemical Bank & Trust Company, Trustee under a true indenture with the Debtor securing a series of the Debtor's bonds known as "Fifteenth Series" (R. 12a-16a; AA. 12a-16a).

The basis for federal jurisdiction in the court of first instance is the Bankruptcy Act, including the jurisdiction of courts of bankruptcy to make effective and carry out confirmed plans of reorganization of corporations.

When the Debtor filed its petition for reorganization it had outstanding 18 Series of bonds, each secured by a trust fund, consisting of mortgages, cash and other securities, held by a Bank as trustee under a trust indenture with the Debtor.

The Debtor was found to be insolvent and a Plan of Reorganization was confirmed which provided, in part, for a new corporation, also named Prudence-Bonds Corporation, to be owned by the bondholders, an extension of maturity of the bonds and changes in interest provisions. Eleven Banks were trustees of the eighteen Series. Under the Plan, one of the Banks became trustee of all Series under a supplemental indenture with the new Prudence-Bonds Corporation.

Upon confirmation, jurisdiction was retained to carry out the Plan. To that end the bankruptcy court, among other things, approved the appointment of the successor indenture trustee, approved the supplemental indenture, and directed the original indenture trustees to transfer the trust funds to the successor trustee and to account in the reorganization proceeding for their acts as trustees.

Each of the indenture trustees submitted to the jurisdiction of the bankruptcy court, filed its account and petitioned for the judicial settlement thereof and a discharge from all liability. The jurisdiction of the bankruptcy court over the accountings was upheld in *Central Hanover Bank & Trust Co.* v. *President & Directors of Manhattan Co.* (C. A. 2), 105 F. 2d 130. On the mandate of the Court of Appeals in that case, the bankruptcy court decreed that it had and exercised full, complete and exclusive jurisdiction to settle the accounts and to hear and determine any and all objections thereto. Objections to all accounts were timely filed and there then ensued further litigation in the accounting proceedings, including several appeals to the Court of Appeals.*

Chemical Bank & Trust Company, Trustee of Prudence-Bonds, Fifteenth Series, like the other indenture trustees, filed its account in the Debtor's reorganization proceeding and petitioned the bankruptcy court for a judicial settlement thereof and a discharge from all liability as Trustee (R. 12a-13a; AA. 12a-13a).

Objections to the account were filed by Prudence-Bonds Corporation (New Corporation) and others and the account and objections were referred to a Special Master (R. 12a-13a; AA. 12a-13a).

The Master, after a trial, determined that the Bank had been negligent and had violated express provisions of the trust indenture and recommended that it be surcharged $1,071,404.18, plus interest at the rate of 3% on the items making up the surcharge from the respective dates thereof in 1930 and 1931 to the date of the decree on the accounting (R. 16a-17a; AA. 16a-17a).

The District Court Judge overruled the Master with respect to certain major items and reduced the surcharge

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* See *Chemical Bank & Trust Company, Trustee* v. *Prudence-Bonds Corporation (New Corporation), et al.*, 207 F. 2d 67, and cases there cited, footnote "1" p. 70, cert. den., 347 U. S. 904.

to $159,216.66, plus interest at 3% as recommended by the Master (R. 16a-17a; AA. 16a-17a; *Chemical Bank & Trust Company, Trustee* v. *Prudence-Bonds Corporation* (*New Corporation*), *et al., supra,* at p. 70).

The judgment recommended by the Master, with interest at 3% to the date of the decree of the District Court, would have amounted to approximately $1,780,000.00.

The judgment recovered under the decree of the District Court, dated December 19, 1952, including interest at 3% to such date, plus costs of $1,193.37, amounted to $262,760.17 (R. 23a; AA. 23a).

Both the Bank and the Objectors (petitioners here) appealed, and the Court of Appeals on the prior appeal restored the judgment "to nearly that allowed by the Master" (*Chemical Bank & Trust Company, Trustee* v. *Prudence-Bonds Corporation* (*New Corporation*), *et al., supra,* at p. 77).

Upon the mandate of the Court of Appeals, which was silent about interest pending appeal, the District Court, on October 23, 1953, entered a decree providing for a judgment against the Bank totaling $1,781,870.75, made up of the following four items (R. 6a-8a; AA. 6a-8a; *infra,* p. 15):

1. $262,760.17, the amount of the original judgment of the District Court.

2. $1,489.074.42, the amount of the additional surcharge recovered on appeal, $902,750.00, plus interest, totaling $586,324.42, at 3% to December 19, 1952, the date of the District Court's original judgment.

3. $28,078.85, additional District Court costs recovered on appeal.

4. $1,957.31, costs in the Court of Appeals.

If the District Court, it should be noted, had not erroneously overruled the Special Master, and had not erred in awarding costs, its original judgment, entered December 19, 1952, would have included items "2" and "3" above. And the sum total of items "1", "2" and "3", $1,779,913.44, would have borne interest at the New York legal or judgment rate of 6% from December 19, 1952, until paid.

The decree of the District Court, entered October 23, 1953 on the mandate of the Court of Appeals dated October 5, 1953, was made upon that basis. The decree awarded interest on items "1", "2" and "3" at 6% from December 19, 1952, the date of the District Court's original judgment, until paid. With respect to the Appellate Court costs, item "4" above, interest was awarded at 6% from October 23, 1953, the date of the decree on mandate, until paid (R. 7a-8a; AA. 7a-8a).*

Upon appeal by the Bank from the decree on mandate, the majority of the Court of Appeals held that, since the Court's mandate on the prior appeal was silent about interest pending appeal, interest on the amount by which the judgment was increased on appeal should commence to run at the rate of 6% from October 23, 1953, the date of the judgment on mandate, and not from December 19, 1952, the date of the District Court's original judgment (R. 37a-40a; *infra,* pp. 15-16).

The majority of the Court of Appeals also denied petitioners' request that, if necessary, the mandate be amended to provide for interest on the increased awards at the 6% rate pending the appeal (R. 40a; *infra,* p. 16).

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* The District Court, in awarding interest on the recovery obtained on appeal at the judgment or legal rate of 6% pending the appeal, followed an earlier decree of the same District Court Judge made on a mandate of the Court of Appeals on an accounting in this same proceeding by one of the other Bank Trustees of two Series of the Debtor's bonds, where, as here, the Court of Appeals substantially increased a judgment originally awarded by the District Court (R. 29a-36a; A. 1a-8a; *infra,* pp. 16, 17).

The result is that under the majority decision of the Court of Appeals, petitioners are entitled pending the prior appeal to interest at 6% on $262,760.17 (amount of the District Court's original judgment), and at only 3% on $902,750.00 (principal amount of additional surcharge recovered on appeal), whereas, if the District Court had not erred in reducing the surcharge determined by the Master and in awarding costs, petitioners would have recovered interest for such period at 6% on $1,779,913.44, the sum total of items "1", "2" and "3" above.

Judge Frank, dissenting, held that the majority decision is "most unjust" and "in direct conflict with *Givens* v. *Missouri-Kansas-Texas R. Co. of Texas,* 196 F. (2d) 905 (C. A. 5)" (R. 41a, 43a; *infra,* pp. 17, 19).

Reasons for Allowance of Writ

There are cogent reasons for granting certiorari. There is a conflict of authority; the injustice of the result is manifest; the issue has not been, but should be, settled by this Court. Not only has Judge Frank, dissenting below, stated that certiorari should be granted (R. 43a; *infra,* p. 19), but four Justices of this Court have said that "the question is of considerable importance" and "the uncertainty as well as the conflict of decision should be ended" (*Briggs* v. *Pennsylvania R. Co.,* 334 U. S. 304, 313-314, dissenting opinion Mr. Justice Rutledge, joined by Mr. Justices Black, Douglas and Murphy). More particularly the reasons for allowance of the writ are:

1. The Court of Appeals for the Second Circuit has rendered a decision on an important question of federal law and practice in direct conflict with decisions on the same matter of Courts of Appeals of other Circuits.

Judge Frank, dissenting below, stated that the decision of the majority Judges "is, I think, in direct conflict with

Givens v. *Missouri-Kansas-Texas R. Co. of Texas,* 196 F. (2d) 905 (C. A. 5)", and he expressed the hope "that the Supreme Court will grant certiorari here" (R. 43a; *infra,* p. 19).

The majority Judges relied upon this Court's decision in the *Briggs* case, *supra* (C. A. 2), 164 F. 2d 21, aff'd, 334 U. S. 304 (R. 40a; *infra,* p. 16).

This Court, however, in the *Briggs* case, as the Fifth Circuit Court of Appeals said in the *Givens* case, "pretermitted a decision of the question of whether on proper application interest should be allowed from the day on which the plaintiff was originally entitled to judgment in the district court" (196 F. 2d 905, 906; See 334 U. S. at p. 307).

In the *Givens* case, the Fifth Circuit Court of Appeals decided such question in the affirmative. In the instant case, the majority Judges of the Second Circuit decided the question in the negative. The conflict is direct and plain.

Judge Frank, dissenting in the instant case, said (R. 43a; *infra,* pp. 18-19):

> "Since our decision in the *Briggs* case (1947), Congress has abolished court terms and we are now entirely free to change our mandate to achieve justice. See 28 U. S. C. § 452, and *National Comics Publication* v. *Fawcett Publications,* 198 F. (2d) 927 (C. A. 2). Moreover, here the plaintiffs specially request us to amend our mandate. My colleagues' decision refusing to do so is, I think, in direct conflict with *Givens* v. *Missouri-Kansas-Texas R. Co. of Texas,* 196 F. (2d) 905 (C. A. 5). I hope, therefore, that the Supreme Court will grant certiorari here." *

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* There was, in fact, no question in the instant case regarding amending the mandate after the Term. The mandate on the prior appeal is dated October 5, 1953, the first day of the 1953 Term of the Court at which the decision here sought to be reviewed was rendered (R. 25a; AA. 25a).

The decision below, in addition to being in direct conflict with the *Givens* case, is also probably in conflict with other cases where Courts of Appeals, to achieve justice, have amended their mandates to provide for interest at the legal rate pending appeal.

See: *Wright* v. *Paramount-Richards Theatres* (C. A. 5), 198 F. 2d 303, 308; *Coyle Lines* v. *United States* (C. A. 5), 198 F. 2d 195, 196; Cf. *Cleveland Tankers* v. *Tierney* (C. A. 6), 169 F. 2d 622.

See also: *Phillips Petroleum Co.* v. *Oldland* (C. A. 10), 187 F. 2d 780, cert. den. 342 U. S. 816; *First Nat. Bank & Trust Co.* v. *Village of Skokie* (C. A. 7), 198 F. 2d 1017, 1019; *Reynolds* v. *Chicago St. P. M. & O. R. Co.* (C. A. 8), 168 F. 2d 944, 945.

The decision below also appears to be in direct conflict with *The Kia Ora* (C. A. 4), 252 Fed. 507, where the Fourth Circuit Court of Appeals stated, p. 511:

> "As the decree of the District Court would bear interest from its date, the decree, as modified, will bear interest as if the increased award had been allowed by the District Court."

The majority Judges of the Second Circuit have here held, in effect, that the Court will not in any case, either in its mandate or by amendment of its mandate, provide for the judgment rate of interest on an increased award pending appeal. The majority Judges, in declining to amend the mandate to provide for such interest, gave this reason (R. 40a; *infra*, p. 16):

> "* * * The delay in the entry of the proper judgment was necessary in the sense that time for appellate reviews was required."

That is true of all appeals diligently prosecuted and emphasizes the conflict of decision. In the *Givens* case, where judgment for defendant was reversed with instruc-

tions to enter judgment for plaintiff, the Fifth Circuit Court of Appeals had no hesitation in amending its mandate to provide for the judgment rate of interest from the date of the District Court's original judgment for defendant (196 F. 2d 905, 906).

2. The injustice of the refusal of Courts of Appeals to award a successful appellant the judgment rate of interest on the sum or additional sum recovered on appeal from the date of the District Court's original judgment is plain. It is especially plain here where petitioners would have recovered such interest had it not been for the errors of the District Court Judge in overruling the Special Master's Report and very substantially reducing the amount of judgment recommended by the Master.

Judge Frank, who participated in hearing and deciding the prior appeal, stated in his dissenting opinion on the instant appeal (R. 41a; *infra*, p. 17):

> "• • • True, we said nothing [in deciding the prior appeal] on that subject [interest], for the very simple reason that we did not think about it. If we had, I have not the slightest doubt that we would then have said that, as the judge ought to have given judgment on December 19, 1952 for the much larger amount, interest on that figure should be at 6% from that date. For it is most unjust that, merely because the trial judge erred in over-ruling the Special Master, the plaintiffs, successors of bondholders who lost heavily on account of the Bank's negligence should be deprived of the full 6% rate on more than $1,500,000 for some ten months —from December 19, 1952 until October 23, 1953, when the new judgment on the mandate issued."

3. The Court of Appeals has decided an important question of federal law and practice which has not been, but should be, settled by this Court.

The importance of the issue is apparent from the large volume of cases in which it arises. The issue concerns:

(a) All cases involving claims bearing interest before judgment at rates less than the legal or judgment rate; and

(b) All cases, such as, for example, Federal Employers' Liability and Jones Act cases, where interest runs only from the date of judgment; *

and where, in respect of any such case, a judgment for defendant is reversed on appeal and a money judgment awarded to plaintiff, or where a money judgment for plaintiff is increased on appeal.

In the *Briggs* case, *supra,* this Court, as previously stated, did not reach the question here presented (334 U. S. 307). Mr. Justice Rutledge in a dissenting opinion, in which Mr. Justices Black, Douglas and Murphy joined, stated (334 U. S. 313-314):

"Since the Court does not decide that question, I reserve decision upon it. But I dissent from the refusal to decide it now. The question is of considerable importance for the proper and uniform administration of the statute; it is not entirely without difficulty; and the uncertainty as well as the conflict of decision should be ended. There is no good reason for permitting their indefinite continuance, to the perplexity of courts and counsel, and to an assured if unpredictable amount of injustice to litigants."

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* 45 U. S. C. Sec. 51; 46 U. S. C. Sec. 688; *Cleveland Tankers* v. *Tierney, supra,* at p. 626.

CONCLUSION

Wherefore, it is respectfully prayed that this petition for a writ of certiorari be granted.

Respectfully submitted,

CHARLES M. MCCARTY,
Counsel for Petitioner Prudence Bonds Corporation (New Corporation).

GEO. C. WILDERMUTH,
Counsel for Petitioner Successor Trustee of Debtor.

SAMUEL SILBIGER,
Counsel for Petitioner George E. Eddy.

AARON SCHWARTZ,
Counsel for Petitioners Rosalie Samson, Gottlieb Trading Company, Transient Trading Company, Keystone Investing Company, Mardel Company, Rego Trading Company and Estate of Herman Gottlieb.

August 16, 1954.

APPENDIX

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 229—October Term, 1953.

(Argued April 9, 1954 Decided June 3, 1954.)

Docket No. 22971

CHEMICAL BANK & TRUST COMPANY, as Successor Trustee, *Appellant,*

v.

PRUDENCE-BONDS CORPORATION (New Corporation), *et al.*, *Appellees.*

Before:

CHASE, *Chief Judge,* SWAN and FRANK, *Circuit Judges.*

Appeal from the United States District Court for the Eastern District of New York, Inch, *Chief Judge.*

This is an appeal by the Bank from a decree entered upon the mandate of this court issued in a prior appeal, the appellant contending that the decree does not accord with the mandate. Decree modified and cause remanded with directions.

SHEARMAN & STERLING & WRIGHT, *Attorneys for appellant;* John A. Wilson, Lester Kissel and Willard M. L. Robinson, of counsel.

CHARLES M. MCCARTY, *Attorney for Prudence-Bonds Corporation (New Corporation)*; GEORGE C. WILDERMUTH, Attorney for *Successor Trustee of Debtor;* SAMUEL SILBIGER, *Attorney for George E. Eddy;* NEMEROV & SHAPIRO, *Attorneys for Rosalie Samson;* KOENIG & BACHNER, *Attorneys for Gottlieb Trading Company et al., for appellees.*

SWAN, *Circuit Judge:*

This appeal is an aftermath of the prior decision of this court reported in *Chemical Bank & Trust Company* v. *Prudence-Bonds Corporation (New Corporation), et al.,* 207 F. 2d 67, cert. den., 347 U. S. 904. The case involved an accounting by the Bank as successor trustee under a trust agreement securing the Fifteenth Series of bonds issued by the debtor corporation. Objections to the account were filed, some of which were sustained and others rejected by the District Court. Its decree, entered December 19, 1952, gave judgment against the Bank for $262,760.17, with interest thereon at 6% per annum from the date of the decree. Both the Bank and the Objectors appealed. On the Bank's appeal we affirmed; on the Objectors' we reversed, with directions to increase the surcharge by $902,750, with interest at 3% per annum on the several items making up such additional surcharge, and to require the Bank to pay all costs of the proceeding. A mandate, in the usual form, taxed appellate costs in favor of the Objectors in the sum of $1957.31, and directed that further proceedings be had "in accordance with the decision of this Court." [1] On Octo-

[1] Our opinion was filed August 20, 1953; the mandate was issued October 5, 1953 after denial of the Bank's petition for rehearing, and filed in the District Court October 7.

ber 23, 1953 a decree was entered on the mandate.[2] The present appeal brings up that decree, the Bank contending that it does not comply with the mandate in certain respects.

The decree now before us provides that Prudence-Bonds Corporation (New Corporation) recover from the Bank the following four sums: (1) $262,760.17 (the amount of the original judgment entered December 19, 1952); (2) $1,489,-074.42 (the amount of the additional surcharge of $902,750, plus interest of $586,324.42, such interest being computed on the various items making up the additional surcharge at 3% per annum from their respective dates up to December 19, 1952); (3) $28,078.85 (being the increase in costs above those included in item (1)). Each of these three items is to carry interest at 6% per annum from December 19, 1952. Item (4) is $1957.31 (the appellate costs as taxed in our mandate) and is to carry interest at 6% per annum from the date of the decree, October 23, 1953. The appellant contends that none of the above items should carry 6% interest before entry of the decree on mandate.

Since we affirmed the 1952 judgment in so far as it awarded recovery of $262,760.17, we think the decree on mandate is correct in applying the 6% judgment rate from December 19, 1952. This accords with 28 U. S. C. A. § 1961 and Rule 29(a) of the Rules of this court. As to the additional surcharges based on releases of cash, we stated that each should bear interest "at 3% from the date when it was made." We did not state when the interest period should end, but the implication is clear that it should continue until entry of the decree awarding recovery of the surcharges. We did not direct entry of judgment as of December 19, 1952. Until the decree on mandate was entered, the amount of the additional surcharge and interest thereon

[2] Timely notice of appeal was filed November 19, 1953. On December 30, 1953 the Bank filed a petition for certiorari to review the prior decision of this court. This was denied February 1, 1954, 347 U. S. 904. Thereafter on March 9, 1954 the Bank filed its brief and appendix.

was unliquidated, and no duty to pay the 6% judgment rate of interest thereon arose. The same is true as to additional costs. Accordingly imposition of the 6% rate on items (2) and (3) from and after December 19, 1952 was not in accordance with the mandate. As to those items that rate should begin on October 23, 1953.

The appellees request that if the court should be of opinion that it was necessary for its mandate to provide specifically for interest on the increased awards at the judgment rate of 6% from the date of the original judgment, that the mandate be recalled and so amended. This request is denied. The delay in the entry of the proper judgment was necessary in the sense that time for appellate reviews was required. See *Briggs* v. *Pennsylvania R. Co.*, 2 Cir., 164 F. 2d 21, 23, affirmed 334 U. S. 304. The decree on mandate in *President and Directors of Manhattan Co.* v. *Kelby*, 2 Cir., 147 F. 2d 465, cert. den. 324 U. S. 866, is not a controlling precedent to the contrary, since the decree on mandate was never reviewed.

The judgment is modified and cause remanded for recomputation of interest in conformity with this opinion.

FRANK, *Circuit Judge* (dissenting):

On the former appeal, 207 F. (2d) 67 (C. A. 2), we held that the district judge had erred in failing to find that the Bank owed substantially the amount previously determined by the Special Master, whose conclusions the judge had over-ruled in large part. In other words, we held that, had the judge not erred, his judgment, entered on December 19, 1952, would have been not merely for $262,760.17 but for about a million dollars greater.

The judge, in arriving at his much smaller judgment of $262,760.17, had included interest at 3% up to the date of judgment (*i.e.*, December 19, 1952). We said (207 F. (2d)

at 77) that, as the Bank had been but negligent and not guilty of bad faith, we would not disturb the exaction of only 3% (instead of 6% as urged by the plaintiffs) to the date of judgment, since, in the circumstances, that was a matter within the judge's discretion. But I do not at all agree [1] with my colleagues that, in our ruling, "the implication is clear" that 3% only was to be the rate on the large amount by which we increased the sum due, from December 19, 1952 to the subsequent entry of the revised judgment pursuant to our mandate. True, we said nothing on that subject, for the very simple reason that we did not think about it. If we had, I have not the slightest doubt that we would then have said that, as the judge ought to have given judgment on December 19, 1952 for the much larger amount, interest on that figure should be at 6% from that date. For it is most unjust that, merely because the trial judge erred in over-ruling the Special Master, the plaintiffs, successors of bondholders who lost heavily on account of the Bank's negligence, should be deprived of the full 6% rate on more than $1,500,000 for some ten months—from December 19, 1952 until October 23, 1953, when the new judgment on the mandate issued. (The plaintiffs did not, on the previous appeal, ask us to direct a judgment *nunc pro tunc,* doubtless because, in one of this series of cases, a suit by these plaintiffs against another bank, The Bank of Manhattan, where we reversed and remanded without such a direction, the same trial judge had entered judgment *nunc pro tunc,* with interest at 6%, and that bank had not appealed.)

I agree that, in the light of *Briggs* v. *Pennsylvania R. Co.,* 164 F. (2d) 21, 23 (C. A. 2), affirmed 334 U. S. 304, our mandate did not authorize the judge to enter judgment on the mandate as he did. But in the *Briggs* case, both this court and the Supreme Court (1) stressed the fact that our term had expired when the second appeal was

[1] I happened to be one of the panel of this court which heard and decided the earlier appeal.

taken, and (2) expressly refrained from deciding whether, even so, our mandate should have been amended if on the second appeal the plaintiff had requested the Court to amend it.[2] The Supreme Court, in the *Briggs* case, said: "It is clear that the interest was in excess of the terms of the mandate and hence was wrongly included in the District Court's judgment and rightly stricken out by the Circuit Court of Appeals. The latter court's mandate made no provision for such interest and the trial court had no power to enter judgment for an amount different than directed. If any enlargement of that amount were possible, it could be done only by amendment of the mandate. But *no move to do this was made during the term at which it went down. While power to act on its mandate after the term expires survives to protect the integrity of the court's own processes,* Hazel-Atlas Glass Co. v. Hartford Co., 322 U. S. 238, *it has not been held to survive for the convenience of litigants.* Fairmont Creamery Co. v. Minnesota, 275 U. S. 70. The plaintiff has at no time moved to amend the mandate which is the basis of the judgment. That it made no provision for interest was apparent on its face. Plaintiff accepted its advantages and brings her case to this Court, not on the proposition that amendment of the mandate has been improperly refused, but on the ground that the mandate should be disregarded. Such a position cannot be sustained. *Hence the question whether interest might, on proper application, have been allowed, is not reached.*"[3]

Since our decision in the *Briggs* case (1947), Congress has abolished court terms and we are now entirely free to change our mandate to achieve justice. See 28 U. S. C. § 452, and *National Comics Publication* v. *Fawcett Publications* 198 F. (2d) 927 (C. A. 2). Moreover, here the plaintiffs specially request us to amend our mandate. My col-

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[2] See *Givens* v. *Missouri-Kansas-Texas R. Co. of Texas,* 196 F. (2d) 905, 906 (C. A. 5).

[3] Emphasis added.

leagues' decision refusing to do so is, I think, in direct conflict with *Givens* v. *Missouri-Kansas-Texas R. Co. of Texas*, 196 F. (2d) 905 (C. A. 5). I hope, therefore, that the Supreme Court will grant certiorari here.

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of June, one thousand nine hundred and fifty-four.

Present:

HON. HARRIE B. CHASE,
Chief Judge,

HON. THOMAS W. SWAN,
HON. JEROME N. FRANK,
Circuit Judges.

In the Matter
of
PRUDENCE-BONDS CORP.,
Debtor,

In the Matter of the Judicial Settlement of the account of proceedings of Chemical Bank & Trust Company, etc., Chemical Bank & Trust Company, as trustee.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is modified and action remanded for recomputation of interest in accordance with the opinion of this court; with costs to the appellant.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

A. DANIEL FUSARO,
Clerk.

Statutes

UNITED STATES CODE

Judiciary and Judicial Procedure Law, 28 U. S. C. Sec. 1961 (former Sec. 811).

"Interest.

Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law."

NEW YORK, CIVIL PRACTICE ACT

"Sec. 481. *Judgment to bear interest.*

A judgment for a sum of money rendered in a court of record or not of record, or a judgment rendered in a court of record directing the payment of money, bears interest from the time when it is entered. But where a judgment directs that money paid out shall be refunded or repaid, the direction includes interest from the time when the money was paid unless the contrary is expressed."

NEW YORK GENERAL BUSINESS LAW, MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED, BOOK 19:

"Sec. 370. *Rate of interest.*

The rate of interest upon the loan or forbearance of any money, goods, or things, in action, except as otherwise provided by law, shall be six dollars upon one hundred dollars, for one year, and at that rate, for a greater or lesser sum, or for a longer or shorter time."

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FILED
SEP 14 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1954

No. 289

PRUDENCE-BONDS CORPORATION
(New Corporation), *et al.*,
Petitioners,

against

CHEMICAL BANK & TRUST COMPANY, Trustee,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The majority and dissenting opinions in the Court of Appeals for the Second Circuit (R. 37a-43a) are reported at 213 F. 2d 443. The District Court rendered no opinion.

Jurisdiction

The judgment of the Court of Appeals was entered on June 3, 1954 (R. 44a-45a). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1) and Sec. 24(c) of the Bankruptcy Act, 11 U. S. C. Sec. 47(c).

Question Presented by Petitioners

The question formulated by petitioners is not presented in the case at bar.

That question is:

> "Where a money judgment is increased by a United States Court of Appeals and the mandate is silent on the subject of interest on the amount of the increase pending appeal;
>
> "Is the successful appellant entitled to interest on the amount of the increase from the date of the district court's original judgment at the rate allowed by State law on money judgments, or should the Court of Appeals, to achieve justice, amend its mandate to award such interest?"

But the facts in the case at bar are different from those upon which that question is premised. The mandate here was not silent on the subject of interest on the amount of the increased award pending appeal. The Court of Appeals awarded interest at 3% on the principal amount of the increased award during the period of the appeal.

Petitioners' original appeal to obtain 6% interest was unsuccessful; the Court of Appeals held that interest at the rate of 3% was compensatory and no penalties should be imposed.* As the case was in equity, the rate of interest was in the discretion of the Court.

Consideration of that part of the question dealing with amendment of the mandate would require a review of the entire case on the original appeal, because there the Court ascertained the equities between the parties which determined the rate of interest applicable. This Court has denied a petition for certiorari to review that case. (Feb. 1, 1954, No. 516 Oct. Term 1953.)

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* The opinion of the Court of Appeals for the Second Circuit on the merits, dated August 20, 1953, is reported at 207 F. 2d 67 (certiorari denied 347 U. S. 904).

Statement

In reorganization proceedings in bankruptcy of Prudence-Bonds Corporation (hereinafter referred to as the "Debtor"), respondent Bank, as Successor Trustee of Prudence-Bonds, Fifteenth Series, filed its accounting in September 1938 and prayed for a judicial settlement and approval.

In 1945, objections were timely filed by the reorganized Debtor, Prudence-Bonds Corporation (New Corporation), the reorganization Trustees of the Debtor and certain individual bondholders, who are the petitioners here.

These objections were referred to a special master to take testimony and to report on the facts and the law with his recommendation and opinion thereon. Both petitioners and respondent filed objections to the report of the special master to the District Court.

Decision and Decree of District Court

The District Court dismissed the first of the three objections. On the second objection, which challenged the propriety of twelve releases of excess cash collateral by respondent to the Debtor, totalling $1,045,250, between October 31, 1930 and August 17, 1931, the District Court awarded $142,500, the principal amount of five of those twelve releases. On the third objection, the District Court awarded $16,716.66, the principal amount of certain collections of mortgage principal retained by the Debtor. The District Court also awarded interest at 3% on the amount of each transaction from the date thereof to the date of the entry of the decree. The decree (R. 12a-24a), entered December 19, 1952, awarded $159,216,66 principal, plus $102,350.14 interest; plus $1,193.37 costs, making a total of $262,760.17 (R. 23a-24a).

In *President and Directors of Manhattan Co.* v. *Kelby*, 147 F. 2d 465 (2 C. A. 1945), cert. den. 324 U. S. 866 (1945), an accounting proceeding by the Trustee of Prudence-Bonds, Fifth and Ninth Series, in the same bankruptcy reorganization proceedings, the Court of Appeals held (p. 479) that the rate of interest on each improper withdrawal should be at the discretion of the Court and not at the full legal rate.

Cross Appeals to the Court of Appeals

On cross appeals, petitioners contended, among other things, that the rate of interest on the amount of each transaction from the date thereof should be 6% rather than 3%. Respondent contended, among other things, that, in any event, the interest rate should not exceed the 3% awarded by the District Court.

Decision of Court of Appeals, August 20, 1953

The Court of Appeals modified the decree of the District Court. In sustaining the second objection in full, that Court surcharged the respondent $1,045,250 for all twelve cash releases "together with interest on each at 3% from the date when it was made". Petitioners' contention that the transactions for which respondent was surcharged should bear interest at the rate of 6% per annum was rejected.

The Court of Appeals said (207 F. 2d 67 at p. 77):

> "We are not inclined to upset the joint findings of good faith made below. . . . The events happened back in the halcyon days of high finance before the legal responsibilities of indenture trustees had been judicially defined. Looking now at these matters by wisdom of hindsight we should not attempt to enforce penalties based on a standard unrealistically high for the era. At any rate, we do not think the

conduct of the Bank [respondent here] such as to require the full measure of exaction or deprive the court of its discretion to allow interest at the lesser rate. . . ."

In the *"Summary and Direction"* of its opinion, that Court stated (pp. 81-82):

". . . We have ruled that the second objection must be sustained in full and the Bank [respondent here] surcharged for all twelve cash releases from October 31, 1930, through August 17, 1931, together with interest on each at 3 per cent from the date when it was made; and we have further ruled that the Bank must pay all the costs of this proceeding, including the compensation to the Master."

The judgment and the mandate of the Court of Appeals provide that the order appealed from is affirmed as to the appeal of the respondent Bank and reversed as to the petitioners' appeal, with costs, "for additional awards in accordance with the opinion of this court" (R. 25a).

Decree of District Court on Mandate

The decree of the District Court entered on October 23, 1953, on the mandate of the Court of Appeals, contained provisions for the following:

$1,061,966.66	principal;
688,674.56	interest at 3% from the date of each transaction to December 19, 1952;
1,193.37	costs awarded by District Court;
28,078.85	increased costs in the court below, awarded by the Court of Appeals;
$1,779,913.44	plus interest at 6% thereon from De-

cember 19, 1952 to the date of payment thereof, plus costs on appeal of $1,957.31 with interest at 6% from October 23, 1952, the date of the decree on mandate.

The decree of the District Court was contrary to the decision and mandate of the Court of Appeals in providing for interest during the period of ten months prior to the entry of the decree upon mandate, as follows: (1) interest at 6% on the $902,750 additional surcharge awarded by the Court of Appeals; (2) interest at 6% compounded on the interest calculated at 3%, on that $902,750 additional surcharge, from the date of each transaction to December 19, 1952; and (3) interest at 6% on the increased costs awarded by the Court of Appeals.

Decision of Court of Appeals, June 3, 1954

The Court of Appeals (Judges Chase, Swan and Frank) in a majority opinion written by Judge Swan, with which Judge Chase concurred, modified the decree of the District Court, because it did not conform with the mandate of the Court of Appeals, and said:

> ". . . As to the additional surcharges based on releases of cash, we stated that each should bear interest 'at 3% from the date when it was made.' We did not state when the interest period should end, but the implication is clear that it should continue until entry of the decree awarding recovery of the surcharges. We did not direct entry of judgment as of December 19, 1952. Until the decree on mandate was entered, the amount of the additional surcharge and interest thereon was unliquidated, and no duty to pay the 6% judgment rate of interest thereon arose. The same is true as to additional costs. Accordingly imposition of the 6% rate on items (2) and (3) from and after December 19, 1952 was not

in accordance with the mandate. As to those items that rate should begin on October 23, 1953.

"The appellees request that if the court should be of opinion that it was necessary for its mandate to provide specifically for interest on the increased awards at the judgment rate of 6% from the date of the original judgment, that the mandate be recalled and so amended. This request is denied. The delay in the entry of the proper judgment was necessary in the sense that time for appellate reviews was required. See *Briggs* v. *Pennsylvania R. Co.*, 2 Cir., 164 F. 2d 21, 23, affirmed 334 U. S. 304. . . ."

Judge Frank's dissenting opinion contained the following:

"I agree that, in the light of *Briggs* v. *Pennsylvania R. Co.*, 164 F. (2d) 21, 23 (C. A. 2), affirmed 334 U. S. 304, our mandate did not authorize the judge to enter judgment on the mandate as he did. . . ."

Summary of Argument

The petition presents no question "whose resolution will have immediate importance far beyond the particular facts and parties involved."*

This is an equity case where the Court, in its proper discretion, has determined that 3% interest is equitable compensation and that a 6% rate of interest would be a penalty that should not be imposed. Accordingly, the Court awarded petitioners 3% interest on the increased award of the Court of Appeals, during the period of the appeal and properly denied petitioners' motion to amend the mandate.

* Address of the late Chief Justice Vinson before American Bar Association, September 7, 1949.

Petitioners, however, seek compound interest. They want interest at 3% for about twenty years and also demand compound interest at 6% on that total interest balance, for about ten months prior to the grant of the increased award by the Court of Appeals. That result would be inequitable; it would impose penalites in addition to awarding compensation, which the Court concluded should not be allowed.

A consideration of that question would require a review of all the facts in the original appeal.

There is no conflict of decisions. The case at bar is distinguishable from those cases that petitioners say are in conflict.

No Special and Important Reason Warrants Review

Petitioners have received equitable interest compensation, but they seek the aid of this Court to obtain not only a higher interest rate, but, in addition, compound interest, although the Court below, sitting in equity, determined that such demand would require the imposition of unwarranted penalties.

The Court of Appeals did not deny interest to petitioners on the increased award during the period of the appeal, although the petition herein repeatedly states that the mandate was silent about interest pending the appeal.* Indeed, if the mandate had been silent on this subject, petitioners, on the authority of *Briggs* v. *Pennsylvania R. Co.*, 334 U. S. 304, would not have been entitled to any

* Petitioners state: ". . . The Court's mandate on the prior appeal was silent about interest pending appeal, . . ." Petition, p. 6). "Upon the mandate of the Court of Appeals, which was silent about interest pending appeal, . . ." (Petition, p. 5). Also, see Petition, p. 2, Question Presented.

interest during the period of the appeal. Petitioners have received interest at the equitable rate of 3% during the period of the appeal.

On each transaction involved in the $902,750 additional surcharge awarded by the Court of Appeals, petitioners have received interest at 3% from the date thereof to October 23, 1953 when judgment was entered on the mandate of the Court of Appeals. That award of interest totals $609,177.60. However, petitioners, in addition, seek about $30,000 compound interest. They wish to calculate interest at 3% to December 19, 1952, ten months prior to the entry of the decree on mandate, and then obtain compound interest thereon at 6% for that period.

No conflict in decisions

Petitioners have cited no case in direct conflict with the case at bar. None of the cases cited by petitioners awarded compound interest such as is demanded here. Indeed, one of them specifically refused compound interest.

Givens v. *Missouri-Kansas-Texas R. Co. of Texas*, 196 F. 2d 905 (C. A. 5), did not award compound interest. In an action at law, the Court of Appeals in the *Givens* case allowed interest at the legal rate on the amount of a jury verdict during the period of appeal.

In the equitable case at bar, the Court allowed interest at the equitable rate on the amount of surcharges during the period of appeal.

As the Court of Appeals in the case at bar had allowed interest at the equitable rate of 3%, which was determined on the merits of the case, the Court properly denied petitioners' motion to amend the mandate to obtain the legal rate of interest at 6% on the principal award and in addition compound interest at 6% on the interest

award. The Court had already determined that petitioners were not equitably entitled to any such penalties.

Thus the *Givens* case is not in conflict with the case at bar.

Petitioners state that the decision below is "probably in conflict" with the following cases (Petition, p. 9). On the contrary, they are all readily distinguishable.

Reynolds v. *Chicago, St. P., M. and O. R. Co.* (C. A. 8), 168 F. 2d 944, refused to grant plaintiff's demand for compound interest during the period of the appeal, which petitioners demand in the case at bar. In the *Reynolds* case the Court amended its mandate to allow interest "without any compounding" during the period of the appeal.

In *Wright* v. *Paramount-Richards Theatres* (C. A. 5), 198 F. 2d 303, 308, on the original appeal in an action at law, legal interest was allowed on a jury verdict during the period of appeal. In *Coyle Lines* v. *United States* (C. A. 5), 198 F. 2d 195, 196, on the original appeal in an admiralty case, interest at 4% was allowed on the amount of a collision damage award. *Cleveland Tankers* v. *Tierney* (C. A. 6), 169 F. 2d 622, is similar to the case of *Coyle Lines.*

Phillips Petroleum Co. v. *Oldland* (C. A. 10), 187 F. 2d 780, cert. den. 342 U. S. 816, held that interest was properly allowed by the District Court on a judgment, since the mandate of the Court of Appeals left that question to the discretion of the lower court.

In *First National Bank & Trust Co.* v. *Village of Skokie* (C. A. 7), 198 F. 2d 1017, the Court construed its own mandate as providing for interest during the period of the appeal. In the case at bar the Court of Appeals construed its mandate as providing for the equitable rate of interest during the period of appeal.

In *The Kia Ora* (C. A. 4), 252 Fed. 507, the Court in its mandate directed the District Court to award interest during the period of appeal, just as the Court of Appeals did in the case at bar.

Petitioners (Petition, p. 9) state that the court below held, in effect, that it would not "in any case", either in its mandate or by amendment of its mandate, provide for the judgment rate of interest on an increased award pending appeal. That statement is clearly erroneous. The court below, on the particular facts in this equity case, determined that petitioners were entitled to an equitable rate of interest as compensation and no more; and that, therefore, there was no reason to provide otherwise in its mandate or by amendment of its mandate.

Whether or not the mandate should be amended to award interest at 6% during the period of the appeal and to award the compound interest demanded by petitioners involves the merits of the accounting proceeding and would require a review of the entire case to determine the equities.

Thus the decision at bar is dependent upon its own peculiar facts and is of importance only to the parties in the case. There is no conflict in the decisions. No special and important reason warrants a review.

If the Court, however, should decide to grant the petition now presented, we believe the Court should vacate its order denying the respondent's petition for certiorari in *Chemical Bank & Trust Company, Trustee* v *Prudence-Bonds Corporation* (*New Corporation*), *et al.*, 347 U. S. 904, and should grant respondent's petition. The question presented in respondent's petition would necessarily be involved in a consideration of the question presented here. The question in respondent's petition involved the merits of the accounting proceeding. The question here involves a review of the merits to determine the equities between the parties.

Conclusion

1. The petition for a writ of certiorari should be denied.

2. In the event the petition should be granted, respondent requests the Court to vacate its order denying certiorari in *Chemical Bank & Trust Company, Trustee* v. *Prudence-Bonds Corporation (New Corporation), et al.*, 347 U. S. 904, and to grant respondent's said petition.

Respectfully submitted,

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September 10, 1954.